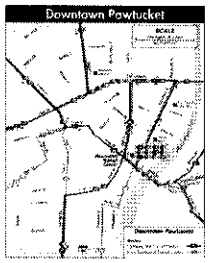
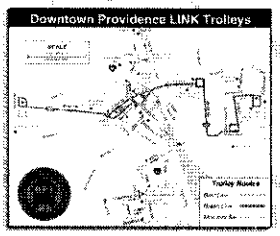
ATTACHMENT B

REDACTED-FOR PUBLIC INSPECTION

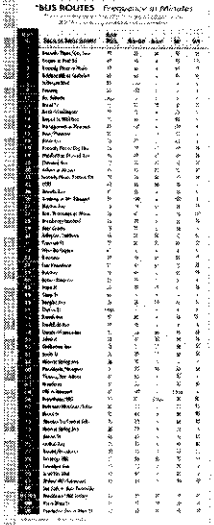
RHODE ISLAND PUBLIC TRANSIT AUTHORITY

System Map 2007/2008





*BUS ROUTES Frequency in Minutes



ATTACHMENT C

REDACTED-FOR PUBLIC INSPECTION

WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW
Washington, DC 20006

Tel: 202 303 1000
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April 17, 2007 ***EX PARTE***

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
Washington, D.C. 20554

Re: Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Statistical Areas; WC Dkt. No. 06-172

Dear Ms. Dortch:

Time Warner Telecom Inc., Cbeyond, Inc. and One Communications Corp., ("One Communications") (collectively "Joint Commenters") file this is ex parte to revise two points made in their Opposition filed in the above referenced proceeding.

First, due to a calculation error, the Joint Commenters' Opposition filed in the above-referenced docket misstated the number of wire centers in the six MSAs at issue where unbundled loops and transport are no longer available as a result of the *Triennial Review Remand Order* triggers. According to the latest data from Verizon, DS1 UNE loops are unavailable in 18 wire centers and DS3 UNE loops are unavailable in 32 wire centers in the six MSAs. With respect to transport, Tier 1 wire centers comprise 89 wire centers in the six MSAs and Tier 2 wire centers comprise 47 wire centers in these six MSAs. We have also corrected the enclosed map of New York City originally filed with the Joint Commenters' Opposition. The corrected version, like the original, indicates that DS1 and DS3 UNE loops are unavailable in large portions of New York City, and particularly Manhattan.

This revised data still clearly demonstrates that competitors are already unable to obtain loop and transport UNEs in large portions of the six MSAs. Non-impairment is concentrated in those dense urban areas such as lower Manhattan where it would be expected that competitive deployment is greatest. Because Verizon has not disaggregated any of its evidence of competitive deployment by wire center, it is possible, even likely, that much of this alleged deployment is centered in unimpaired wire centers. **[proprietary begin] [proprietary end]**. For this reason, much of Verizon's data regarding competitive networks and deployment is irrelevant to the relief that it seeks.

Second, in its Opposition, the Joint Commenters asserted that One Communications never constructs its own loop facilities and never offers services at higher than a single DS3 of capacity. *See Opposition* at 5, 21. In exceptional circumstances (e.g., where barriers to loop deployment are unusually low), however, One Communications has deployed its own loop facilities at DS3 or lower capacities. One Communications has virtually never done so in the six MSAs that are the subject of the Verizon petitions for forbearance. In fact, in the six MSAs at issue, One Communications has deployed its own loop facilities to three locations. Similarly, One Communications serves few customer locations demanding higher than a single DS3 of capacity in any of its markets.

The Joint Commenters have enclosed a corrected version of their Opposition reflecting the changes discussed above.

Pursuant to Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206(b), one electronic copy of this notice is being filed in the above-referenced proceeding.

Respectfully submitted,

/s/
Jonathan Lechter

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Washington, D.C. 20006
(202) 303-1000

ATTORNEYS FOR TIME WARNER TELECOM, CBEYOND AND ONE COMMUNICATIONS

REDACTED-FOR PUBLIC INSPECTION

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Statistical Areas	))))	WC Docket No. 06-172

OPPOSITION OF TIME WARNER TELECOM INC., CBEYOND INC., AND ONE COMMUNICATIONS CORP.

WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

March 5, 2007

REDACTED-FOR PUBLIC INSPECTION

TABLE OF CONTENTS

REDACTED-FOR PUBLIC INSPECTION

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Statistical Areas	))))	WC Docket No. 06-172

OPPOSITION OF TIME WARNER TELECOM INC., CBEYOND INC., AND ONE COMMUNICATIONS CORP.

Time Warner Telecom Inc. ("TWTC"), Cbeyond Inc. ("Cbeyond") and One Communications Corp. ("One Communications") (collectively, the "Joint Commenters"), by their attorneys, hereby submit this opposition to six petitions for forbearance from unbundling and other regulations filed by Verizon in the above referenced docket.[1] As discussed below, the Joint Commenters oppose the Verizon petitions to the extent those petitions seek forbearance from unbundling and other regulations governing access to Verizon local transmission facilities needed to serve business customers.

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[1] *See Pleading Cycle Established for Comments on Verizon's Petitions for Forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Public Notice, WC Docket No. 06-172, DA 06-1869 (rel. Sept. 14, 2006).

I. INTRODUCTION AND SUMMARY.

In the *Triennial Review Order*[2] and *Triennial Review Remand Order*[3], the FCC dramatically scaled back the incumbent LECs' unbundling obligations. Wherever possible, the FCC seized upon indications that it might be "possible" for either an intramodal or intermodal competitor to deploy a specific type of facility as a basis for eliminating unbundling for that facility. Even in the absence of such purported evidence, the FCC relied on the policy goals of Section 706 to eliminate unbundling for packetized and fiber-based loops. But the record left the Commission no choice but to conclude in the *TRRO* that multiple DS-1 and single DS-3 loops do not offer sufficient revenue opportunities to permit competitors to efficiently deploy such facilities in most areas of the country (those wire centers that do not meet the relevant impairment triggers). *See TRRO* ¶ 154. The FCC also had no choice but to conclude that DS-1 and DS-3 transport facilities do not offer sufficient revenue opportunities to allow competitors to efficiently deploy such facilities except along the routes that meet the relevant *TRRO* impairment triggers. *See id.* ¶¶ 126, 129. Even the D.C. Circuit, the same court that had flouted *Chevron* deference in two previous decisions to substitute its dislike of unbundling for the FCC's reasonable interpretations of Sections 251(c)(3) and 251(d)(2), upheld the *TRRO* as a permissible interpretation and application of unbundling provisions of the Communications Act.

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[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order, 18 FCC Rcd 16978, ¶ 150 (2003), *subsequent history omitted* ("*TRO*").

[3] *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶¶ 79-85 (2005) ("*TRRO*").

While competitive carriers like the Joint Commenters had hoped that the D.C. Circuit's affirmance of the *TRRO* would finally yield some regulatory stability, this has not been the case. Beginning with the Qwest petition for Omaha, the subsequent ACS petition for Anchorage and continuing now with the instant Verizon petitions, the incumbent LECs have sought to end run the *TRRO* by seeking forbearance from the few unbundling obligations that remain after the *TRRO*. In reviewing the Qwest Omaha and ACS Anchorage forbearance petitions, the Commission has failed to apply a coherent analytical framework. Most importantly, in the *Omaha Order* and the *Anchorage Order*, the Commission (1) refused to conduct a separate analysis for each type of loop and transport facility subject to the forbearance request, even though it has repeatedly held that this is the appropriate methodology; (2) refused to utilize wire center geographic markets -- as it has repeatedly held are appropriate -- for analyzing unbundled loops where the available data did not support forbearance in particular wire centers; (3) relied on hopeful and baseless predictive judgments -- which have turned out to be wrong -- that the ILECs would have "very strong market incentives" to offer the local transmission facilities in question to competitors on terms and conditions that allow such competitors to compete efficiently even without access to UNEs; and (4) ignored the principle that facilities deployment by intermodal competitors with unique advantages is largely irrelevant to whether UNEs should be retained.

As a result of these methodological errors, the Commission has eliminated unbundling requirements for loop and transport facilities needed to serve businesses in Omaha and Anchorage based on competition from cable operators *in a different product market* -- the residential market. To the limited extent that the Commission has separately analyzed competition in the provision of loops and transport needed to serve businesses at all, it has

refused to do so on a wire center-by-wire center basis, thus eliminating unbundling in some wire centers based on competition in *different geographic markets* -- other wire centers. It has also incorrectly concluded that a cable operator's offer of some services to business customers in a wire center, however limited by network reach or network technology, by itself gives the ILEC the incentive to offer non-cable competitors access to essential loop and transport facilities at prices that allow such intramodal competitors to efficiently serve the market.

In the *Omaha Order* and the *Anchorage Order*, the Commission eliminated unbundling requirements for DS-0, DS-1 and DS-3 loops as well as for DS-1 and DS-3 transport facilities in wire centers where the requirements of Section 10 had not been met. That is, retention of those unbundled elements was clearly necessary to ensure the "charges, practices" and "classifications" of services offered to business customers are just, reasonable and not unjustly or unreasonably discriminatory and were clearly necessary to protect businesses from higher prices and foregone entry and innovation by competitors. Indeed, the proverbial canary in the coal mine has already hit the ground. McLeodUSA, one of the competitors the Commission cited as evidence of the competitiveness of the Omaha market, has now announced that it cannot continue to compete in Omaha without UNEs. McLeodUSA has also stated that no other company will even purchase its Omaha operations, an obvious indication that investors have written off competition in Omaha as a possibility. If the Commission continues to fail to apply sound principles and grants unmeritorious requests for forbearance from unbundling, investors and competitors will write off competition in those markets as well. Businesses located in those areas will experience higher prices and less innovation, exactly the result Congress sought to avoid when it established the unbundling requirements in the Communications Act.

This is the case with the six petitions filed by Verizon. The available evidence demonstrates that Verizon continues to control the only loop and transport facilities capable of serving the vast majority of business locations in the Verizon region generally and in the six MSAs at issue here. Both the GAO and the Justice Department reached this conclusion after comprehensively studying the market in the Verizon region. To the extent that facilities-based competition has developed sufficiently in particular wire centers to justify eliminating UNEs, the ILECs' unbundling obligations already have been eliminated pursuant to the *TRRO* triggers.

Intramodal competitors' limited (or nonexistent) deployment of DS-0, DS-1 and DS-3 loop or DS-1 or DS-3 transport facilities confirms that the Verizon petitions have no merit. Even competitors like TWTC, which is probably deploying its own loop and transport facilities at a faster pace than any other intramodal competitor, cannot deploy those facilities to most business locations. This is true even in New York City. To the extent that TWTC is able to deploy loops in New York City, it has done so largely in those wire centers in which unbundling has been eliminated by operation of the *TRRO* impairment triggers. Other intramodal competitors, including One Communications and Cbeyond, that generally serve only customers that demand less than a DS-3 capacity of service, are almost never able to deploy their own loops.

Verizon has offered no basis for doubting that this is true. It relies on information regarding intramodal competitors' facilities deployment without identifying the wire center in which such facilities are located, thus making this information useless for purposes of the appropriate wire center-by-wire center analysis. To the extent that it is possible to identify the general location of the competitors' facilities mentioned by Verizon, those facilities-- like TWTC's-- are located in areas where unbundling has already been eliminated. Even if the facilities depicted in Verizon's maps and included in its mile totals for fiber deployment were

located in wire centers where unbundling obligations remain, such maps and total mileage would, as the Commission has held, offer no basis for concluding that competitors have deployed facilities *at the specific capacities at issue here*. Verizon also relies on the presence of collocations, but the *TRRO* impairment triggers already account for the presence of collocations to the extent it is appropriate to do so. Nor is Verizon's reliance on competitors' use of special access relevant since the Commission has held that special access is not a substitute for UNEs when competitors seek to provide local service, in part because the very availability of UNEs disciplines ILEC conduct in the provision of special access.

The little evidence offered by Verizon concerning intermodal competitors' readiness, willingness or ability to serve business customers in the six MSAs also confirms that the Verizon petitions must be rejected. *First*, Verizon provides no evidence that cable operators in the six MSAs offer services that are substitutes for DS-0-based services (*e.g.*, xDSL) to business customers in any particular wire center. Of course, Verizon has offered no evidence that cable operators have actually won customers in this market in any particular wire center. Given the Commission's oft-repeated observation that cable networks simply do not reach many areas in which business customers are located, the Commission cannot assume that such service offerings reach many or most small businesses. Even if a cable operator is able to offer substitutes for DS-0 based services to businesses throughout a wire center over a network deployed to provide video services pursuant to a government franchise, such success offers no indication that other competitors lacking a cable company's unique advantages could also deploy loops and transport to provide such services. In any event, the presence of a single cable operator in the market does not give the ILEC the required "very strong market incentives" to offer DS-0 loops to competitors on terms and conditions that support efficient entry.

Second, there is no evidence that cable operators are providing DS-1 or DS-3-equivalent services to businesses in the six wire centers at issue. It is well-established that cable companies' network locations (their networks often do not reach business customers) and the capabilities of their networks (cable companies generally cannot provide DS-1 or DS-3-based services over their hybrid fiber-coaxial (HFC) networks as those networks are currently configured) severely limit cable companies' ability to provide these services. To the extent that cable operators do provide these services, they must generally do so by deploying fiber networks like those deployed by intramodal competitors. In doing so, the cable companies appear to face the same entry barriers as those faced by intramodal competitors. Moreover, Verizon has not offered any evidence that cable companies have overcome these entry barriers in the six wire centers at issue here.

II. THE COMMISSION MUST APPLY THE APPROPRIATE ANALYTICAL FRAMEWORK WHEN CONSIDERING THE VERIZON FORBEARANCE PETITIONS

Under Section 10, forbearance shall be granted only where a legal requirement is no longer necessary to ensure the "charges, practices" and "classifications" of service offered by a carrier are just, reasonable and not unjustly or unreasonably discriminatory, where the legal requirement is no longer necessary for the protection of consumers and where a grant of forbearance comports with the public interest. In assessing petitions seeking forbearance from unbundling requirements, the Commission has focused on whether competition is sufficient to ensure that this standard is met in the absence of the unbundling obligations for which forbearance is sought. *See Omaha Order* ¶ 1, *Anchorage Order*, ¶¶ 27-30. In conducting that analysis with regard to the six petitions at issue in this proceeding, the Commission must utilize appropriate geographic and product markets, and it must grant forbearance only where sufficient facilities-based competition has taken root in the relevant markets. In this regard, the

Commission's analysis must be informed by both its own precedent, its past mistakes in granting forbearance based on predictive judgments that have been proven to be incorrect and sound competition policy.

First, there is now little controversy that the appropriate geographic market for reviewing petitions for forbearance from unbundling local transmission facilities is no larger than individual wire centers. This was the approach the Commission followed in assessing loop impairment in the *TRRO*. Moreover, the Commission adopted wire centers as the geographic market for assessing UNE loop forbearance petitions in both Omaha and Anchorage.[4] In all of these orders, the Commission rejected ILEC requests that it utilize a larger geographic area. Undeterred, Verizon has requested forbearance on an MSA-wide basis in its petitions without offering any basis for adopting this approach. As was the case in Anchorage, the large geographic areas covered by the six MSAs for which Verizon seeks forbearance contain "substantial topographical and density variations" and are not subject to uniform levels of competitive entry. *Anchorage Order* ¶ 15. For example, as discussed below, certain portions of the New York market exhibit extremely high deployment costs **[proprietary begin]** **[proprietary end]** There should be no doubt, therefore, that the Commission should utilize a geographic area that is no larger than a wire center to assess the instant petitions insofar as they address UNEs.

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[4] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶¶ 60-61 (2005) ("*Omaha Order*"); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, FCC 06-188, ¶¶ 14-16 (rel. Jan. 30, 2007) ("*Anchorage Order*").

Second, it is critical that the Commission adopt and consistently utilize appropriate product markets for its analysis. With regard to UNEs, this means that the Commission should assess the extent to which competition, including intermodal competition, exists with regard to "each loop type" (*TRRO* ¶ 210) and each transport type. As the Commission stated in the *Anchorage Order*, this "remains the best way to structure [the] forbearance analysis." *Anchorage Order* ¶ 13. In conducting each product-specific analysis, the Commission has appropriately emphasized the need to analyze the extent to which competitors can provide services that are "substitutes" for ILEC services in the absence of UNEs. *See Omaha Order* ¶ 65. This means that the Commission must separately analyze the extent to which facilities-based competition exists at both the retail and wholesale levels for the services that ILECs provide *via* DS-0 loops (including xDSL services demanded by small business customers), DS-1 loops, DS-3 loops as well as DS-1 and DS-3 transport.

Unfortunately, the Commission did not actually conduct a separate analysis for each of these types of services in either the *Omaha Order* or *Anchorage Order*. After acknowledging the need for a separate analysis of each loop and transport type in each separate wire center, the Commission proceeded to rely on measures of competitive entry that ignored these critical distinctions. In the *Omaha Order*, the Commission relied on aggregate numbers of DS-0, DS-1 and DS-3 circuits sold by competitors to businesses across the nine wire centers in which it granted forbearance. *See id.* ¶ 69. But aggregate data across multiple wire centers offers no basis for granting forbearance in any particular wire center where competition for one or all of these circuits could be non-existent or *de minimis*. Similarly, in both the *Omaha Order* and the *Anchorage Order*, the Commission relied on aggregate data regarding cable network coverage for both residential and business customers (*see Omaha Order* ¶ 69; *Anchorage Order* ¶ 21), but

such average data offers no reliable indication of the cable operator's network coverage for either the circuits demanded by residential customers or the circuits demanded by business customers. Furthermore, the Commission relied on Cox's success in the residential market as a basis for predicting that it would have similar success in the business market (*see id.* ¶ 66), without offering any basis for concluding that this would be the case. The conflation of separate markets in this manner is flatly inconsistent with the Commission's stated objective of separately analyzing the extent to which competitors' facilities and their services provided over those facilities comprise "substitutes" of "each loop type" for which forbearance was sought. The Commission must not repeat this mistake in the instant proceeding.

Third, the Commission must ensure that facilities-based competitors' end user connections are ubiquitous enough to ensure that competition in the relevant markets will continue to exist if Verizon is no longer required to unbundle DS-0, DS-1 and DS-3 loops and transport. For example, in both the *Omaha Order* and *Anchorage Order*, the Commission granted forbearance from Section 251(c)(3) unbundling obligations only in wire centers in which at least one intermodal competitor was offering service over its own "extensive last mile facilities." *Id.* ¶ 59. *See also Anchorage Order* ¶ 31 (applying "extensive" intermodal coverage standard because of "the importance facilities-based last-mile deployment plays in lessening the need for regulatory intervention"). The Commission has concluded that granting forbearance in wire centers "where no competitive carrier has constructed substantial competing 'last mile' facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition." *See Omaha Order* ¶ 60.

The Commission's measure for determining whether an intermodal competitor's last mile facilities have achieved "extensive" or "substantial" presence in a wire center and in a product

market is the "coverage" of end users. That is, a particular customer location is deemed to count toward the requirement of "extensiveness" or "substantiality" only where the intermodal competitor "uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings." *See Omaha Order* n.156. *See also Anchorage Order* ¶ 32 (applying coverage standard). Accordingly, an intermodal competitor's network does not "cover" a customer location unless the competitor is able to serve that location with the full range of services offered in the relevant product market in a timeframe that is equal to or less than the time it takes for a reasonably efficient competitor to provide such services. Furthermore, the intermodal competitor must have substantial enough coverage in the wire center that "all of the customers capable of being served by [the ILEC] from [a] wire center will benefit from competitive rates." *See Omaha Order* ¶ 69.[5]

But ubiquitous "coverage" by a single intermodal competitor by itself is not enough to meet the requirements of Section 10. The competitor must also have demonstrated substantial success in winning retail market share by providing services over its own network. *See id.* ¶ 64, n.177, ¶ 69; *Anchorage Order* ¶ 28. It is insufficient for the intermodal competitor to have established coverage but to have shown little success thus far in actually winning market share

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[5] In the *Anchorage Order*, the Commission inexplicably seemed to depart from this standard and concluded that GCI's network covered customer locations that GCI would only be able to serve after it completed its network upgrade, which will take one-to-two years. *See Anchorage Order* ¶ 36, n. 114. Incredibly, the Commission even went so far as to suggest to GCI ways in which it could serve customers over its existing facilities. *See id.* n.122. Nevertheless, later in the Order, the Commission candidly expressed "concerns" that, in fact, GCI "is unable to provide symmetric high-speed service over its cable plant or otherwise unable to provide particular services to particular customers." *See id.* ¶ 41. In any event, the Commission emphasized that the market conditions and GCI's participation in the market in Anchorage are "unique." *See id.* Thus, the Commission's arbitrary finding that GCI "covers" customer locations that it cannot serve for one or two years should have no bearing on the instant petitions.

from the ILEC. Such success in the retail market must, again, be measured separately for each product market.

Moreover, even if an intermodal competitor has successfully competed in the downstream retail market, forbearance may not be granted unless there is sufficient competition to ensure that the ILEC will offer loops and transport at *wholesale* on terms and conditions that allow competitors in downstream markets to compete efficiently. As the Commission explained, it is critical that facilities-based wholesale competition "minimize[] the risk of duopoly and of coordinated behavior or other anticompetitive conduct." *See Omaha Order* ¶ 71. *See also Anchorage Order* ¶ 46 (relying on continued rate regulation of ACS to prevent the development of "an impermissible duopoly"). To ensure this outcome, the record must support the conclusion that the ILEC have "very strong market incentives" to offer loops and transport on a wholesale basis to competitors on terms and conditions that allow efficient competitors to compete even if UNEs are eliminated. *See Omaha Order* ¶ 81; *Anchorage Order* ¶¶ 39-42 (relying on continued regulation to assuage concerns regarding the adequacy of competition in Anchorage). In determining whether this is the case, the Commission may not infer from the presence of a cable operator's loop and transport facilities that others could deploy such facilities. *See TRO* ¶ 310 (deployment of facilities by intermodal competitors that benefit from "unique" advantages is largely irrelevant to whether other competitors could efficiently deploy the similar facilities). The Commission also may not rely on the availability of special access or Section 271 UNEs as a basis for eliminating UNEs. *See TRRO* ¶¶ 46-63.

As with so many other aspects of its forbearance orders, the Commission has acknowledged the need for a competitive wholesale market, but, in practice, it has granted forbearance in markets where such competition was obviously absent. For example, rather than

conduct an analysis of the competitiveness of the wholesale market in Omaha, the Commission relied on a baseless "predictive judgment" that the presence of a single competitor with limited network coverage among business customers would give Qwest the incentive to offer competitors access to DS-0, DS-1 and DS-3 loops and DS-1 and DS-3 transport needed to serve business customers on reasonable terms and conditions that would support efficient competitive entry. Not surprisingly, this predictive judgment has proven to be incorrect. Since the adoption of the *Omaha Order*, McLeodUSA, one of the few CLECs that had previously tried to compete in Omaha, has announced that its business in Omaha is no longer viable and that, if the *Omaha Order* is not overturned, McLeodUSA will be forced to exit the market.[6] This is because McLeodUSA has apparently been unable to obtain DS-1 facilities (either as special access or "271 UNEs") from Qwest at prices that are low enough to sustain its business. *See id.* at 2. As McLeodUSA explains, "The Commission's prediction that Qwest would negotiate a fair price with McLeodUSA outside the umbrella of regulation was patently incorrect." *Id.* McLeodUSA reports that it has not even been unable to sell its business in Omaha to any prospective suitors and that it has received reasonable offers for its business in other markets where UNEs are still available. *See id.* at 3. McLeodUSA's experience in Omaha since the elimination of UNEs illustrates the need for the Commission to ensure that higher levels of facilities-based wholesale competition exist than was the case in Omaha before eliminating unbundled loops and transport needed to serve businesses.

Finally, the Commission must ensure that interested parties have a meaningful opportunity to assess and comment on data regarding facilities-based entry in the relevant

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[6] *See* Letter of Patrick Donovan, Counsel, McLeodUSA, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No 04-223, at 1 (Dec. 18, 2006).

markets. As explained below, Verizon offers little of substance to support its petitions. This is in part due to the paucity of competition in the relevant markets. But the Commission will likely seek information from the few facilities-based competitors, in particular cable companies, as part of its assessment of the merits of the Verizon petitions. If so, the Commission must ensure that such information is made available to interested parties soon enough that expert economists have a meaningful opportunity to analyze that information and submit that analysis into the record. The D.C. Circuit has consistently held that failing to make critical factual information available to interested parties on a timely basis in a rulemaking proceeding violates the requirements of the Administrative Procedure Act (APA), *see* 5 U.S.C. § 553(c), and is reversible error. *See, e.g., Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 13-14 (D.D.C. 2004) (citing *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982); *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) (same); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (same).

III. THE COMMISSION SHOULD DENY VERIZON'S REQUEST FOR FORBEARANCE FROM LOOP AND TRANSPORT UNES IN THE SIX MARKETS SUBJECT TO VERIZON'S PETITIONS.

The available evidence demonstrates that Verizon continues to control the only viable transmission facility for serving the vast majority of business locations in its territory. This is true, even if one accounts for both intramodal and intermodal (including cable) competitors. Moreover, Verizon has offered no basis in its petitions to doubt that this is the case with regard to any wire center in the six MSAs at issue in which it is still obligated to provide unbundled DS-0, DS-1 or DS-3 loops or DS-1 or DS-3 transport needed to serve business customers. Even in the small business market, in which cable companies have apparently made some modest competitive entry by offering substitutes for services such as xDSL that rely on DS-0 unbundled loops, there is no evidence that a viable wholesale market would exist if unbundled DS-0 loops were eliminated.

Verizon's control of bottleneck local transmission facilities (loops and transport) demonstrates that the continued availability of unbundled DS-0, DS-1 and DS-3 unbundled loops and DS-1 and DS-3 transport is (1) "necessary to ensure that the charges, practices," and "classifications" of services provided to small, medium and large businesses in the six markets at issue are "just, reasonable" and "not unjustly or unreasonably discriminatory;" and (2) "necessary for the protection of consumers" against higher prices charged by Verizon and foregone competition and innovation from UNE-based competitors. Denial of Verizon's request for UNE forbearance is also in the public interest for the similar reason that granting the request would lead to less competition, higher prices and less innovation for all business customers in all of the markets in which Verizon seeks this relief.

A. Aggregate Data Regarding All Competitors Demonstrates That There Is No Basis For Granting The Verizon Petitions For Forbearance From Unbundling Loops Or Transport Needed To Serve Businesses.

Virtually every federal government agency with relevant expertise has now examined the competitiveness of the local transmission (loop and transport) market generally, and in the Verizon region specifically. Every one of these agencies has reached the same conclusion: Verizon has overwhelming market power over the upstream loop and transport inputs needed to serve the small, medium and large business customers. Importantly, every one of these studies accounted for the presence of cable, wireless and other intermodal competitors.

For example, in a recent report, the Government Accountability Office ("GAO") determined that competitors have deployed few facilities in Verizon's markets or nationwide. That report found that, based on data from GeoResults and Telcordia, competitors have deployed transmission facilities to less than 5 percent of the buildings demanding at least DS-1 level

service in the 16 markets studied.[7] As the GAO found, nearly all of the loops that competitors have deployed are well above the DS-1 level of capacity. In light of long-standing entry barriers, the GAO concluded that "wireline facilities-based competition itself may not be a realistic goal for some segments of the market for dedicated access...Where demand for dedicated access is less than 3 or 4 DS-1's, it would appear unlikely that any competitor would extend its network for that business." *GAO Report* at 42. Moreover, the GAO emphasized that its study *accounted for both intramodal and intermodal competition* (including cable companies and wireless). *See id.* at 47.

With regard to New York City and Pittsburgh in particular, the GAO found that competitors had deployed facilities to only 6.8 and 8.1 percent respectively of the commercial buildings in each MSA. Of course, as that report indicated, most of the loops deployed by competitors provide 2 DS-3s or higher of capacity. As a result, competitors likely have deployed loops to well below 6.8 and 8.1 percent of buildings in New York and Pittsburgh that only demand a single DS-3 of capacity or less. Moreover, only evidence of deployment at the DS-1 and DS-3 levels is relevant to determining whether eliminating access to DS-1 or DS-3 UNEs is appropriate.

The Justice Department also conducted an independent review of the market for high capacity local transmission facilities needed to serve businesses in the Verizon territory in connection with its review of the Verizon-MCI merger. The Department concluded that Verizon

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[7] *See GAO, FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 22 (Washington, D.C., Nov. 2006) ("*GAO Report*").The GAO acknowledged that GeoResults data could overcount or undercount the number of buildings served by CLECs and one "price-cap incumbent" suggested that GAO may undercounting by as much as 30 percent. Even if this were the case, "competitive alternatives exist in a relatively small subset of buildings." *Id.*

controlled the only last-mile access to the "vast majority of commercial buildings in its territory,"[8] and that high fixed and sunk costs make deployment of competitors' facilities "difficult, time consuming and expensive..." *Id.* ¶ 27. Given its careful methodology in conducting market review of this sort, it is virtually certain that the Department considered all types of competition, including intermodal, cable and wireless.

Of course, the FCC reached similar conclusions in the *TRRO*. There, the Commission found that competitors serve only 3-5 percent of the commercial buildings nationwide.[9] Moreover, the FCC found that it is not "economic" or "possible" for a reasonably efficient competitor to construct DS-0 loops anywhere in the country or DS-1 or even single DS-3 loops in the vast majority of wire centers in the country. *See TRRO* ¶¶ 149, 166.

Verizon's own data confirm these conclusions. Less than two years ago, Verizon asserted that competitors had deployed loops serving "31,467+" buildings.[10] Verizon indicated that, back in 1996, there were only 24,000 buildings "served directly by CLEC fiber."[11] In other words, in nearly 10 years, competitors added connections to less than 8,000 buildings. Verizon's own data underscores the difficulty of loop deployment and the ILECs' continuing dominance of the market for transmission facilities capable of serving business customers.

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[8] *United States v. Verizon Communications, Inc. and MCI Inc.*, Case No. 1:05CV02103, Complaint ¶ 15 (D.D.C. filed Oct. 27, 2005).

[9] *See TRO* ¶ 298 n.856 (stating that both "competitive LECs and incumbent LECs report that approximately 30,000, *i.e.*, between 3% to 5%, of the nation's commercial office buildings are served by competitor-owned fiber loops").

[10] Verizon Comments, WC Dkt. No. 05-25, Attach. D, Declaration of Quintin Lew, at App. B (June 13, 2005).

[11] Verizon Comments, WC Dkt. No. 05-25, Attach. C, Declaration of William E. Taylor, at Table 10 (June 13, 2005).

In its petitions, Verizon offers no evidence that the entry barriers associated with loop and transport deployment are any less significant or that competition in the local transmission market is any greater in the six markets at issue than is the case elsewhere in the country. Rather than attempt to address these findings, Verizon clouds the record with irrelevant and misleading information. Verizon relies on press statements and website sales material describing the business retail service offerings of competitors that rely on Verizon's loop and transport facilities, evidence that has no relevance to whether competitors can efficiently deploy such facilities themselves.[12] Verizon's extensive reliance on competitors' business E911 listings, an indication of market share gained by competitors that have deployed their own switches, is equally inapposite, because it is not a measure of the extent to which competitors relying on their own loops and transport have gained market share.[13] This is a particularly significant issue in the business market, where many established competitors rely solely or largely on ILEC loops to serve their customers. Similarly, Verizon relies on the presence of systems integrators in the business market (*see, e.g., NY MSA Decl*aration ¶¶ 69-70), but those firms *by definition* rely on the facilities of other carriers to provide services at retail to the enterprise market. Their presence in the market is therefore irrelevant to the question of whether competitors have and can deploy their facilities own transmission facilities.

Verizon's reliance on the recent RBOC/IXC merger orders to demonstrate the scope of facilities-based competition from intramodal and other types of competitors is also misplaced. In

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[12] *See, e.g., Petition of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 (c) in the New York Metropolitan Statistical Area*, WC Dkt. No. 06-172 (filed Sept. 6, 2006) ("*NY MSA Petition*"), Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the New York Metropolitan Statistical Area, ¶¶ 56-69 ("*NY MSA Declaration*").

[13] *See, e.g. NY MSA Declaration* ¶ 47 ("As of [December 2005] competitors had obtained at least **[proprietary begin] [proprietary end]** business E911 listings.").